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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,		C052919
Plaintiff and Respondent,		(Super. Ct. No. 04F03683)
v.		
PHANHNHA XABANDITH,		
Defendant and Appellant.		

In this drive-by shooting case, defendant Phanhnhha Xabandith contends the trial court erred in instructing the jury on the issue of constructive possession and in *not* instructing the jury on the law of accomplices. In addition, defendant contends there was insufficient evidence he possessed five firearms. Finding no merit in these arguments, we will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

One night in March 2004, Lani Chann was driving home from a bar with a friend named Kelly Visamoun. Sang Saelee, the father

of Visamoun's baby, pulled up next to them on the freeway and pointed a gun at them. When Lani Chann got home, she told her husband, Tim, what had happened, and he became angry.

That evening, the Channs went to a Taco Bell three or four blocks away from the house where Saelee and Visamoun lived. While they were there, defendant arrived in a pickup truck with another person. Defendant waved at the Channs, they walked toward his truck, and Tim Chann got in the driver's seat while defendant lay in the truck bed. Tim told Lani to go home, but she followed them instead.

The details of what happened when Lani followed them will be set forth below, in connection with defendant's argument on the accomplice issue. For now, suffice it to say the evidence supported the conclusion that Tim Chann drove to the house where Saelee lived, and defendant popped up from the truck bed and fired over 20 rounds from a rifle toward the house, striking one man in the leg.

Later that night, police, conducting a probation search of an apartment after receiving a noise complaint, found five firearms in a closet. Ballistics evidence showed that one of the firearms in the closet was used in the shooting.

Defendant was charged with attempted murder, assault with an assault weapon, shooting from a motor vehicle, possession of an assault weapon (two counts), and being a felon in possession of a firearm (three counts). The jury found defendant not guilty of attempted murder but guilty of the remaining charges and also found various enhancement allegations true. The trial

court sentenced him to an aggregate determinate term of 30 years 4 months in prison consecutive to an indeterminate term of 25 years to life.

DISCUSSION

I

Accomplice Instructions

Defendant contends the trial court erred in failing to instruct the jury on accomplice testimony because the court should have found that Lani Chann was an accomplice in the drive-by shooting as a matter of law or at least submitted the issue of whether she was an accomplice to the jury. We disagree.

"When there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices." (*People v. Frye* (1998) 18 Cal.4th 894, 965-966.) "An accomplice is . . . one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111.)

"Under California law, a person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.) "[A]n aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the

offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.'" (*Ibid.*)

Defendant contends Lani Chann was an accomplice in the drive-by shooting because she aided and abetted that crime "by functioning as lookout and get-away driver." The evidence, which consisted solely of Lani Chann's own testimony, is to the contrary.

Lani Chann testified that when her husband drove off in defendant's truck she followed because she wanted him to come home. She was worried about where her husband was going and why he was going with the other two men in the truck because he had not "hung around them in so long." A block or two away from Saelee's house, Lani went around the truck in her car and pulled in front of the truck to stop Tim from going on. Tim stopped and spoke with her for a minute or two and told her to go home. He then drove off toward Saelee's house. Lani did not follow him. Two or three minutes later, she heard gunshots, the truck came back, and Tim told her to "'go, go, go,'" which she did.

Based on this testimony, defendant argues Lani Chann was an accomplice because "[s]he waited two blocks from the drive-by shooting to provide assistance to her husband" "if [he] encountered any problems fleeing the scene. This gave Mr. Chann the assurance that he had a backup get-away car and that if anything went wrong, he could get a ride from his wife." In essence, defendant claims that knowing a drive-by shooting or some other kind of assault was going to take place, Lani aided

the commission of the crime by waiting nearby with the purpose of assisting her husband in fleeing the scene if necessary.

There are two flaws in this argument. First, defendant's conclusion that Lani Chann waited with the intent of assisting her husband in fleeing the crime scene is based on nothing but sheer speculation. Lani did not testify as to why she waited, let alone testify that she waited to help her husband get away. Nor is it a fair inference from her testimony that her purpose was to assist her husband. It was undisputed that Lani tried to *stop* her husband from going to Kelly's house, but he told her to go home. While the jury did not have to believe Lani's testimony, "merely disbelieving [her] would not be evidence that [she] aided and abetted [the crime]. There is no direct evidence that would tie [her] into aiding and abetting, and at best, there is only a suspicion that [s]he might have done so." (*People v. Drolet* (1973) 30 Cal.App.3d 207, 217.)

Second, even if we were to assume the evidence supported a rational inference that Lani waited with the intent to help her husband flee the crime scene, defendant fails to adequately explain how her waiting *aided the commission of the crime*. Defendant contends Lani's action "provid[ed] the reassurance to her husband that he had a backup getaway car available to him." But there is no evidence in the record (substantial or otherwise) that Tim Chann took reassurance from the fact that Lani remained nearby while the shooting occurred. On the contrary, Lani testified that Tim told her to *go home*, and there is no evidence he was aware his wife declined to follow his

instruction. Thus, there is no evidence from which a reasonable jury could have found that Lani's waiting aided, promoted, or encouraged the commission of the crime.

Defendant's reliance on *People v. Bynes* (1963) 223 Cal.App.2d 268 is misplaced. *Bynes* involved rape charges against four men who raped a single victim in succession. (*Id.* at pp. 270-271.) The court concluded that each defendant aided and abetted the rape committed by every other defendant because while each rape was occurring the others stood nearby, presenting a show of force and keeping watch against intrusion. (*Id.* at p. 273.) In doing so, they aided and encouraged each act of rape. (*Ibid.*)

We have already explained that there was no evidence here Tim Chann knew his wife was waiting to assist him in fleeing the crime scene. That is sufficient to distinguish this case from *Bynes*, where each perpetrator obviously knew his cohorts were standing nearby keeping watch. Accordingly, we find no error in the trial court's failure to instruct the jury on the law of accomplices.

II

Instructions On Constructive Possession

In instructing the jury on the elements of the offense of possession of a firearm by a felon, the trial court used CALCRIM No. 2510, which provides in relevant part as follows: "A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person."

During deliberations, the jury asked the court for its definition of "possession." With the agreement of counsel, the court responded in relevant part as follows: "There are two kinds of possession: actual possession and constructive possession. [¶] Actual possession requires that a person knowingly exercise direct physical control over a thing. [¶] Constructive possession does not require actual possession but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons." Later that afternoon, the jury advised the court it was hung on the last four possession counts. The trial court received the verdicts on the first four counts and sent the jury back for further deliberation on the remaining counts (the possession charges relating to the firearms not used in the shooting).

The next day, after deliberating for about an hour, the jury asked for "a more detailed explanation of 'right to control' as found under constructive possession." With the agreement of counsel, the court responded, "The issue as to whether the defendant had either control of, or the right to control, any of the weapons in question is an issue of fact that is for the jury to determine. The phrase 'right to control' has no special legal meaning that differs from its everyday use." Less than an hour after the court responded, the jury advised that it had reached verdicts on the remaining counts.

Defendant contends the trial court erred in instructing the jury on the possession charges because the trial court "failed

to instruct the jury on the precise meaning of the term[] . . . 'control' used in the definition of constructive possession."¹ According to defendant, "the term control . . . ha[s] a specialized meaning in the law," and to communicate that meaning to the jury, the trial court had an obligation to "advise the jury that mere opportunity of access [i]s insufficient to show possession."

We find no merit in defendant's argument. It is true that "the trial court has a *sua sponte* duty to give explanatory instructions even in the absence of a request when the terms in an instruction 'have a "technical meaning peculiar to the law."' " (*People v. Valenzuela* (1985) 175 Cal.App.3d 381, 393.) However, "No such duty is imposed when the terms 'are commonly understood by those familiar with the English language.'" (*Ibid.*)

The terms at issue here -- "control" and "right to control" -- are not terms that have a technical meaning peculiar to the law. To "control" means "to exercise restraining or directing influence over." (Merriam-Webster's Collegiate Dict. (10th ed. 2000) p. 252, col. 1.) A "right" is "something to which one has a just claim: as . . . the power or privilege to which one is justly entitled." (*Id.* at p. 1005, col. 2.) Employing these commonly understood definitions, the jurors would have

¹ Defendant also asserts the trial court did not adequately instruct on the meaning of the term "dominion," but, as shown above, the instructions the court gave did not use the term "dominion."

understood that to find defendant guilty of constructively possessing the firearms in the closet, they would have to find that defendant had restraining or directing influence over those firearms or the power or privilege to exercise restraining or directing influence over those firearms, either directly or through another person. A reasonable juror familiar with the English language would *not* have understood or believed that mere access to the firearms was sufficient to find defendant constructively possessed them, because mere access does not amount to control or the right to control, as those terms are commonly understood. If a person is following a total stranger down the street, that person may have access to the wallet in the stranger's back pocket -- because he *could* just reach in and take it -- but no reasonable person would believe that person has *control* over the stranger's wallet or the *right to control* that wallet.

In arguing that the trial court's responses to the jury's questions were inadequate, defendant points out that "[a] definition of a commonly used term may nevertheless be required if the jury exhibits confusion over the term's meaning." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1015.) That rule does not apply here. The jury asked for the court's definition of "possession," and the court properly defined that term using the terms "control" and "right to control," consistent with its previous instructions. The jury then asked for "a more detailed explanation of 'right to control,'" and the court properly explained that that phrase "has no special legal meaning that

differs from its everyday use." Less than an hour later, the jury returned its verdicts on the remaining possession charges. Because the jury did not express any confusion over the meaning of the phrase "right to control" once the trial court explained that the jury was to apply that phrase consistent with "its everyday use," it was not error or an abuse of its discretion for the court not to offer the jury a dictionary definition of the phrase. More to the point, under the circumstances, the trial court had no obligation to inform the jury that mere access is not sufficient to constitute constructive possession, because the jury's questions did not suggest the jury believed otherwise.

III

Sufficiency Of The Evidence Of Possession

Defendant contends the evidence was insufficient for the jury to find that he possessed the firearms found in the closet. We disagree.

Defendant does not claim the evidence was insufficient for the jury to find he was the shooter, nor does he dispute that ballistics evidence showed one of the rifles found in the closet was used in the shooting. Thus, defendant offers no valid argument against his conviction on count four, which was the charge of possessing the rifle used in the shooting. His sufficiency of the evidence argument is more accurately aimed at his convictions on counts five, six, seven, eight, which were charges of possessing the four other firearms found in the closet -- two shotguns, another rifle, and a handgun.

We will not set out the legal principles governing challenges to sufficiency of the evidence at length here, as we have recently set them out at length elsewhere. (See *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1572-1574.) Suffice it to say that to prevail on his argument, defendant "must set forth in his opening brief *all* of the material evidence on the disputed elements of the crime in the light most favorable to the People, and then must persuade us that evidence cannot reasonably support the jury's verdict." (*Id.* at p. 1574.) He has failed to do so.

While there may have been no *direct* evidence that defendant exercised control over or had the right to control the guns found in the closet (except for the rifle used in the shooting), there was evidence of the following facts: (1) defendant used a rifle to commit a shooting that occurred just before 10:40 p.m. on March 19, 2004; (2) immediately after the shooting, Lani Chann followed her husband and defendant to an apartment building at 1065 Santiago; (3) Lani went to (but not inside) the third apartment in that building, and she saw defendant there; (4) less than four hours later, police were called out on a noise complaint involving people at apartment No. 3 at 1065 Santiago; (5) as the officers were waiting to be let in the locked gate, one of them saw a group of people standing inside the complex; (6) the people in the group turned and looked at the officers, then most of the group went into apartment No. 3, while two others -- one of whom was defendant -- went to an apartment in the neighboring building; (7) when the officers

went to apartment No. 3 at 1065 Santiago, they found 8 to 10 people there, all of whom claimed not to know who lived there; (8) two of the people there were on searchable probation and turned out to be known members of the El Camino Crips (ECC) gang; (9) as of the date of the shooting, defendant was a "hardcore" member of the ECC gang; (10) when the officers searched the apartment, they found five firearms in a closet, including the rifle defendant used in the shooting, along with a bulletproof vest and over 200 rounds of ammunition; (11) when police later went to the apartment where they had seen defendant go, defendant identified himself as Nattasan Xabandith (his brother's name), which was the name of the person on the lease of apartment No. 3 at 1065 Santiago beginning March 8, 2004; and (12) numerous people, including defendant, kept clothes at apartment No. 3 at 1065 Santiago, and no one appeared to live there full time.

To his credit, defendant sets forth most of the foregoing evidence in the statement of facts in his opening brief. The problem comes when he argues the sufficiency of the evidence that he possessed the firearms in the closet. Defendant's entire argument (with the exception of his discussion of the applicable legal principles) is as follows: "The guns in the apartment were linked to [defendant] in two ways. First, one of the guns was used in the drive-by shooting. [Defendant] was using the name and that name was on the lease. [¶] The evidence did not show [defendant] was ever inside the apartment

and did not show he controlled the guns. The evidence certainly did not show [he] occupied the apartment."

This argument vastly understates the scope of the evidence relevant to the possession issue and ignores the rational inferences that can be drawn from that evidence when viewed in the light most favorable to the People. Viewed in that light, the evidence supports the rational inference that apartment No. 3 at 1065 Santiago was some sort of "safe house" or "crash pad" for members of the ECC gang, including defendant, and after defendant used a rifle in a drive-by shooting, he returned that rifle to the closet in that apartment where the gang kept its weapons. The evidence also supports the rational inference that defendant, as a member of the gang, had the right to exercise restraining or directing influence over (i.e., constructive possession of) *all* of the firearms in the closet. Thus, defendant's challenge to the sufficiency of the evidence is without merit.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SIMS, Acting P.J.

HULL, J.